Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Forbearance of the Verizon Telephone Companies	)	CC Docket No. 01-338
	)	
	)	

COMMENTS OF WORLDCOM, INC. ON VERIZON'S PETITION FOR FORBEARANCE

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INTRODUCTION AND EXECUTIVE SUMMARY

Verizon's forbearance petition ignores the plain language of the Telecommunications Act and the statutory purpose underlying that language. Verizon wants this Commission to treat the checklist requirements in section 271 of the Act as identical to the unbundling requirements of section 251, so that a Commission decision not to unbundle an element under section 251 would eliminate any corresponding obligation to provide that element under section 271. Verizon alternatively requests that the Commission forbear from applying the requirements of section 271 with respect to any element that does not have to be unbundled under section 251. Verizon's petition must be rejected.

Verizon urges the simplistic proposition that sections 251 and 271 serve identical purposes and must be interpreted identically. Rather than starting from an unsupportable assertion of Congress' purpose, however, and reasoning to what it wishes the statute meant, Verizon should have started with the actual statutory language. While section 251 of the Act provides the Commission some discretion as to what elements must be unbundled by incumbent local exchange carriers ("ILECs"), section 271 provides a definitive requirement that certain elements must be provided by Bell Operating Companies ("BOCs") if they seek to offer in-region long distance service. The statutory language reflects Congress' belief that there were particular dangers that warranted more specific market opening requirements for BOCs providing in-region long distance service than for ILECs generally.

Because the specific requirements of the section 271 checklist are not eased if the Commission decides not to unbundle an element under section 251, any such

Commission action does not alter a BOC's obligation to provide those elements in order to obtain in-region long distance authority, and to do at cost-based rates, as we show in part I.

The statutory differences between sections 251 and 271 also mean that the Commission must reject Verizon's request that the Commission forbear from applying the requirements of the checklist whenever the Commission decides not to unbundle an element under section 251. The Commission has no discretion to forbear from applying the checklist requirements until a BOC has "fully implemented" the requirements of section 271 as a whole. A Commission decision not to require unbundling of an element under section 251 does not somehow demonstrate that all BOCs have fully implemented the section 271 requirement to provide that element, much less that the BOCs have fully implemented the requirements of section 271 as a whole, as we show in part II. Indeed, because the obligations of section 271 continue even after a BOC has obtained in-region long distance authority, a BOC cannot be said to have fully implemented the requirements of section 271 until there is at least a flourishing wholesale market.

Finally, Verizon's request for forbearance also must be rejected as premature. The Commission has not yet decided on the section 251 unbundling standard or what elements would not have to be unbundled. Any decision to forbear from applying one of the requirements of the checklist must be a contextual inquiry that takes into account the reasons that Congress included the element on the checklist and the specific reason that the Commission decided not to unbundle the element under section 251, and that inquiry can occur only after section 271 is fully implemented. Verizon's categorical request for forbearance, like its petition as a whole, turns on the premise that sections 251 and 271

serve identical purposes. But the plain language of the Act shows that this premise is faulty.

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Verizon's forbearance petition requests the Commission rule as a general matter that any elements the Commission determines in the ongoing Triennial Proceeding not to unbundle under section 251 of the Telecommunications Act of 1996 should automatically be erased from the Act's section 271 checklist. Verizon argues in the alternative that the Commission should forbear from applying the requirements of section 271 with respect to any element that does not have to be unbundled under section 251. But Verizon ignores the plain language of the statute and the statutory purposes underlying that language. Its request is unlawful and should be denied.

I. THE UNBUNDLING REQUIREMENTS IN SECTIONS 251 AND 271 ARE NOT THE SAME

A. Verizon Must Meet the Requirements of the Section 271 Checklist Even for Elements that Are Not Unbundled Under Section 251

Verizon's petition is based on the simplistic proposition that sections 251 and 271 serve identical purposes. Verizon presumes from this that sections 251 and 271 must be interpreted identically or that, at the very least, the Commission should forebear from

applying the requirements of section 271 once the requirements of sections 251 have been met.

This is plainly wrong. Any interpretation of a statute must start from the language of the statute, and Verizon simply ignores this language. Section 271 mandates particular elements that must be unbundled, including loops, switching and transport. Section 271(c)(2)(B)(iv), (v), (vi). It expressly requires that a Bell Operating Company ("BOC") "provide" these facilities to competitors. The statute is unambiguous that the BOC must "fully implement" its obligation to provide these elements before it receives long distance authority.

In section 251, by contrast, Congress did not specify particular elements that had to be unbundled. Congress provided the FCC discretion to determine which elements should be unbundled under the standards set forth in that section, which mandate that the Commission consider "at a minimum," whether a competitive local exchange carrier ("CLEC") would be impaired without access to the element. That is why in the Triennial, commenters are arguing both over the meaning of these standards and over the particular elements that have to be unbundled. In the past, the Commission has declined to unbundle particular elements even though it concluded that CLECs would be impaired without access to those elements in some circumstances, based on other considerations. What standards it will apply in the future, and the particular decisions that will result from the application of those standards, will be decided in the pending Triennial Proceeding.

Verizon ignores these differences and blithely asserts that any judgment not to unbundle an element under section 251, based on any conceivable standard, must

necessarily require that the particular requirements of section 271 should be superceded. It reasons that if the Commission has declined to unbundle the element for any reason under section 251, the BOC must necessarily have fulfilled its obligations with respect to that element under section 271. Verizon does not even attempt to explain how this could possibly be so given the explicit requirements of that section. Moreover, even if Verizon's proposal made sense as a matter of logic or policy – and it does not – its interpretation would necessarily limit the terms of the competitive checklist in direct contravention of section 271(d)(4).

As for Verizon's argument about the purpose of the Act, the best evidence of that purpose is what the Act actually requires. If Congress had intended the unbundling requirements under section 271 to mirror those in section 251, it would have made the requirements identical. Indeed, it did exactly that in the second checklist item, which incorporates by reference the unbundling requirements of section 251(c)(3). But Congress also added as independent, additional checklist items the requirements that the Bell Company seeking long distance entry provide competitors access to its loops, switching and transport facilities, as well as other items. These checklist requirements would have no purpose had Congress wished to require as a precondition to long distance entry only that the BOCs provide access to facilities the Commission unbundled pursuant to section 251.

If Verizon believes that Congress did not act sensibly in imposing these additional unbundling requirements on Bell Companies seeking long distance authority, it should take the matter up with the Congress, and not with this Commission. In any event, Congress' judgment makes perfect sense. Section 251 applies to all incumbent local

exchange carriers ("ILECs"). It applies to ILECs even if they are providing only local service, and not long distance service. In implementing section 251, the FCC is called upon to consider the appropriate regulatory conditions necessary to open local markets.

Section 271, on the other hand, applies only to BOCs who wish to enter their in-region long distance market. BOCs are also ILECs, but are the large entrenched ILECs that are most capable of using their monopoly power to monopolize long distance markets unless competitors have unfettered access to facilities that connect them to their customers. As a result, the safeguards contained in section 271 focus more directly upon the dangers of BOC provision of long distance service. Congress required unbundling of loops, switching, transport and other elements as a prerequisite to BOC provision of long distance service because it concluded that the risks of remonopolization of long distance markets was great unless competitors had access to specified BOC facilities. While the FCC might properly take other matters into consideration in making its judgments about local competition under section 251, Congress saw fit to require this open access as an unalterable prerequisite necessary to protect long distance competition under section 271.

This is clear not only from the structure of the Act but also from its history. The Act was enacted against the background of the Modified Final Judgment ("MFJ"). In the proceedings that broke up the Bell System, evidence was presented that BOCs required long distance carriers to pay rates far in excess of economic cost for access to switches and other facilities essential to making and completing long distance calls, and that these "price-cost squeezes" allowed the BOCs to exercise substantial control of the long distance market. *See United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1352-53, 1355-57 & n.81 (D.D.C. 1981). In the MFJ, therefore, the Bell System was

split into local and long distance components, and each BOC was enjoined from providing long distance service until there was "no substantial possibility" that the BOC could use a monopoly over local telephone service to "impede competition" in the long distance market. The District Court and the D.C. Circuit held that the MFJ's long distance restriction could not be removed until there were either ubiquitous alternatives to local BOC facilities or new regulations that would allow BOC competitors access to necessary facilities on the same economic terms as the BOCs enjoy. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 536 & n.43, 536-46 (D.D.C. 1987), *aff'd on this ground*, *rev'd in part on other grounds*, 900 F.2d 283, 311 (D.C. Cir. 1990).

Because section 271 substitutes for the MFJ's prohibition on BOC provision of long distance service, Congress wanted to be absolutely certain the local markets were open before allowing such entry. *See*, *e.g.*, H.R. Conf. Rep. No. 104-458 at 149 (1996) (expressing Congress' concern that BOCs not be permitted into long distance if they can use their power in the local market to impede competition in the long distance market).[1] Congress' first principle was do no harm. It wanted to be sure the Act did not reinstitute monopoly in the markets that previously had been made competitive by the MFJ. Thus, as the Commission has previously explained, "[a]lthough Congress replaced the MFJ's

[1] *See also* 141 Cong. Rec. S8460, S8464 (June 15, 1995) (Statement by Sen. Dorgan, a member of the Senate Commerce Committee) (allowing BOC entry "prematurely. . . risk[ed] damaging that competitive [long] distance market."); 141 Cong. Rec. S8134, 8139 (June 12, 1995) (statement of Sen. Kerry) ("Removing the separation between the local markets and other markets without ensuring that the Bell companies cannot use the local monopoly to hurt competition and long-distance could squander the gains of the past decade").

The limitation of section 271 to BOCs was based on the parallel limitation in the MFJ. After all, it was BOC conduct that was challenged in the antitrust suit that led to the MFJ. *See BellSouth Corp. v. FCC*, 162 F.3d 678, 692 (D.C. Cir. 1998) (rejecting bill of attainder challenge to this approach).

structural approach, Congress nonetheless acknowledged the principles underlying that approach – that BOC entry in the local market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition. This is clear from the structure of the statute, which requires BOCs to prove that their markets are open to competition before they are authorized to provide in region long distance services." *Michigan 271 Order* ¶ 18.

Verizon argues, however, that when the Commission decides not to unbundle an element under section 251, that necessarily means that all barriers to competition have been eliminated. Verizon states that the Commission will not refrain from unbundling an element under section 251 unless "competitors are not impaired by lack of access to an element." Verizon Petition at 5. In that case, Verizon suggests, there will always be "sufficient competition to discipline the ILEC." *Id*. But at the same time, Verizon and other BOCs advocate unbundling standards under section 251 that would result in elimination of unbundling in some cases even when competitors *would* be impaired without that element, as well as advocating definitions of impairment that allow unbundling to occur long before establishment of a truly competitive market. Verizon argues, for example, that the decision to unbundle should be based in part on the effect that unbundling will have on an ILEC's incentive to invest. The Commission has previously declined to unbundled elements on that very basis, even though it concluded that CLECs would be impaired without access to these ILEC facilities. Obviously, a decision to refrain from unbundling on this basis by no means ensures that the market is truly competitive.

If the Commission adopts such an approach, or if the Commission construes "impair" in such a way that it could find no impairment even when the market is not perfectly competitive, section 271's checklist requirements would serve important competitive needs even when an element has been removed from the section 251 unbundling list.

Indeed, the Commission has already said as much. In the *UNE Remand Order*, the Commission concluded that even when circuit switching and shared transport need not be unbundled under section 251, "access and interconnection to these elements remains an obligation for BOCs seeking long distance approval." *Id*. ¶ 468. The Commission could hardly have concluded otherwise as that is what the language of the Act plainly requires.

B. Checklist Items Must Be Provided at Cost-Based Rates

Verizon suggests that even if BOCs are required to provide the elements listed in the section 271 checklist as a prerequisite for obtain in-region interLATA authority, they do not have to provide those elements at cost-based rates once the Commission has decided not to unbundle the elements under section 251. Verizon Triennial Reply Comments at 57. Although the Commission previously reached the same conclusion, *UNE Remand Order* ¶ 469, it ought to reconsider that question and conclude to the contrary that its pricing rules establish the appropriate price for all purposes when ILEC facilities must be made available to CLECs to prevent competitive harms. At a minimum, the Commission ought not conclude categorically that elements that are exempted from the unbundling requirements of section 251 can be provided at so-called market rates without violating the section 271 checklist.

It would have been pointless for Congress to have required unbundling under section 271 if the BOCs could charge monopoly prices for the unbundled elements, and Congress did not allow them to do so. In the second checklist item, Congress required that elements be unbundled in accord with the requirements of sections 251(c)(3) and 252(d)(1). Section 251(c)(3) imposes a broad mandate that elements be unbundled at any technically feasible point. And section 252(d)(1) establishes that rates must be cost-based. Section 271 therefore requires the unbundling of elements at cost-based rates without limitation.

Of course, for purposes of section 251, the unbundling mandate of section 251(c)(3) and thus the cost-based mandate of 252(d)(1) is limited by the standards set forth in section 251(d)(2). Under those standards, some elements will not have to be unbundled under section 251. But these standards are not incorporated into section 271. Section 271 only incorporates section 251(c)(3), not section 251(d)(2). For purposes of section 271, network elements must be unbundled according to the standards set forth in section 251(c)(3) unmodified by 251(d)(2) and then all of these elements must be provided in accord with the cost-based requirements of section 252(d)(1).

More generally, the FCC devised the principles of Total Element Long Run Incremental Cost ("TELRIC") to establish a price that would be set by a fully competitive market. In so doing, it stressed that only such a price would send the correct signals to competitors deciding whether to lease or construct facilities. And only such a price would prevent the ILECs from engaging in price-cost squeezes by charging above-cost rates for facilities that competitors were required to lease. These considerations all apply fully in the section 271 context: indeed, they apply in that context most forcefully. The

purposes of section 271 would be fatally undermined if the BOCs were allowed to charge rates in excess of cost for network elements.

The Commission has nevertheless concluded that in some circumstances, there *is* a competitive market for particular facilities, and it makes sense to let that market price prevail. Thus, in the *UNE Remand Order*, the Commission determined that switching for large volume customers did not have to be unbundled under section 251 but did have to be provided under section 271. It concluded that switching could be provided at market rates because "competitors can acquire switching in the marketplace at a price set by the marketplace. Under these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market." *UNE Remand Order* ¶ 473 (footnote omitted). But even if the Commission continues to embrace this conclusion, it should make clear that it applies only when there is in fact a robust competitive market for the element in question. In such circumstances, the market price for the element will be the TELRIC price. But the finding that such market conditions exist must be made element by element. It certainly does not follow simply from a Commission decision not to unbundle an element under section 251 – especially since it is not yet known what standard will be used for that determination.

II. THE COMMISSION CANNOT FORBEAR FROM APPLYING THE REQUIREMENTS OF THE CHECKLIST

Verizon argues that even if the checklist requires that an element be provided, the Commission should forbear from enforcing the checklist requirement once the element is

no longer considered a UNE under section 251. Verizon Petition at 1. Again, however, Verizon's position controverts the statutory language.

In section 10 of the Act, Congress went out of its way to specify that the Commission may *not* forbear from applying the requirements of section 271 until that section has been "fully implemented." As we show in what follows, this requires both full implementation of the checklist and full implementation of the other requirements of section 271 – in essence, requiring the existence of a flourishing wholesale market before the Commission even has the discretion to consider forbearance. Moreover, even if the Commission did have the discretion to forbear at an earlier point, it could not grant Verizon's categorical petition that it always forbear from enforcing the checklist with respect to elements that are not unbundled under section 251. That would be inconsistent with the different purposes of sections 251 and 271.

A. The Commission Has No Discretion to Forbear Before a BOC Has Gained In-Region Long Distance Authority

Verizon initially argues that the Commission should forbear from applying the requirements of section 271 as soon as the Commission decides not to unbundle an element under section 251. Verizon argues that the checklist requirements necessarily have been fully implemented once the requirements of section 251 have been met. But this argument merely repeats Verizon's erroneous claim that the unbundling requirements of sections 251 and 271 are identical. They are not, as we have demonstrated above. The Commission might decide not to require section 251 unbundling of loops for a certain class of customers, for example, based on the existence of facilities based or intermodal competition before any such loops had been provided. Such a decision would not imply anything about whether BOCs had fully implemented the section 271 requirement to

unbundle loops, much less whether the BOCs had fully implemented the requirements of section 271 as a whole. Indeed, since the section 271 requirements are based on Congress' understanding that long distance carriers depend on access to their customers, and since the Commission might determine that this requirement is not determinative in its section 251 analysis, a section 251 ruling does not necessarily indicate anything at all about whether the requirements of section 271 have been "fully implemented."

B. The Commission Has No Authority to Forbear Until a Flourishing Wholesale Market Exists

Even after a BOC has obtained interLATA authority, the Commission does not immediately gain the discretion to forbear. Congress established as a precondition of forbearance that a BOC fully implement section 271 as a whole, not just the competitive checklist. Verizon is therefore wrong when it argues that "whatever else the 'fully implemented' language means, it certainly applies once a BOC has proven that it satisfies the checklist." Verizon Petition at 7. The BOC must also at a minimum implement the other requirements of the section before forbearance is permitted.

Critically, these other requirements include continuing obligations. Section 271(d)(3)(B), for example, requires that BOC interLATA entry be carried out in accordance with the conditions of section 272. And section 271(d)(6) establishes that a BOC must *remain* in compliance with the checklist after it has gained interLATA entry. Congress would not have included this section in the Act if it had intended the requirements of the checklist to disappear as soon as a BOC had gained in-region authority. Indeed, under the authority of this section, the Commission has emphasized the need for continuing compliance with section 271 even after a BOC has gained in-region authority. *See, e.g.*, *Michigan 271 Order* ¶ 22; *Vermont 271 Order* ¶ 3. Under

Verizon's interpretation, however, continuing compliance is not required and section 271(d)(6) does not serve its purpose.

Thus, while it may be difficult to determine what "fully implemented" means in the context of a statute with continuing obligations, one thing is very clear: the "fully implemented" requirement cannot mean that forbearance authority kicks in the instant a BOC gains section 271 authority. Congress would not have carefully laid out specific prerequisites for long distance authorization and then provided the FCC discretion to refrain from applying those obligations the instant the BOC gained such authority. It is at that very moment that the obligations become most important.

The "fully implemented" language must therefore be interpreted in accordance with Congress' overall purpose. With respect to section 271, as we have seen, Congress' purpose was to guarantee that the local market is open to competition if the BOC is to provide in-region long distance service. Congress wanted greater assurance of this then it did in the standards set forth in section 251. It is reasonable to conclude, therefore, that section 271 as a whole has been fully implemented only, at a minimum, after a BOC has gained in-region authority and local competition has grown to the point where there is a flourishing wholesale market in unbundled elements.

Those pre-conditions have not yet been established. Indeed, as WorldCom shows in its UNE Triennial Comments, most local markets remain tightly shut and CLECs continue to be critically dependent on leasing UNEs from the BOCs.

III. VERIZON'S FORBEARANCE PETITION IS PREMATURE AND LACKING NECESSARY EVIDENTIARY SUPPORT

Even if the Commission had the statutory authority to forbear from enforcing checklist items immediately once a BOC gained section 271 authorization, Verizon's petition would have to be rejected. Verizon requests that the Commission make a categorical decision in advance to forbear from applying the checklist wherever the Commission refrains from unbundling a corresponding element under section 251. It asks the Commission to make this determination without knowing the elements that have been excluded from the purview of section 251 or why they have been excluded. And it asks the Commission to make this determination without regard to any specific facts in specific states. In this context, there is no way to conclude that the statutory prerequisites for forbearance have been satisfied.

Under section 10, before the Commission may forbear, it must conclude that the enforcement of the regulation at issue "is not necessary to ensure that charges and practices" at issue are just, reasonable and non-discriminatory (section 10(a)(1)), that enforcement is "not necessary for the protection of consumers" (section 10(a)(2)), and that forbearance is "consistent with the public interest" (section 10(a)(3)). In determining whether to forbear, the Commission must also weigh the effect of forbearance on competitive market conditions. Section 10(b).

These are not judgments that can be made in a vacuum, without regard to the reason the element has been delisted under section 251, and without regard to the particular facts and circumstances in the market whose conditions must be studied before forbearance is granted. Verizon argues that these factors will always justify forbearance once the Commission has determined not to unbundle an element under section 251.

Verizon Petition at 2 n.6. But this interpretation does violence to the statutory text, and would render the statutory scheme nonsensical. Congress would not have established specific obligations as a prerequisite to interLATA authority, much less mandated ongoing compliance, if those obligations automatically vanished the instant such authority was achieved.

As we have seen above, Congress clearly did not believe that the requirements of section 271 were pointless if corresponding elements were not unbundled under section 251. Otherwise, it would not have imposed specific requirements in the checklist beyond a checklist requirement that the unbundling requirements of section 251 be satisfied. The reality is that Congress believed that more certainty was needed that local markets were fully open when a BOC was providing long distance service than when an ILEC was not. The FCC needs to take into account this difference in determining whether to forbear under section 10. But the automatic forbearance requested by Verizon ignores this critical difference altogether.

The forbearance inquiry under section 10 is different from the section 251 inquiry for another reason as well. Under section 251, the determination not to unbundle a particular element could occur before all ILECs have begun providing that element and before any costs associated with unbundling have accrued. But the forbearance inquiry under section 271 cannot occur until after unbundling has been fully implemented. At that point, however, the public interest calculus required by section 10 may have changed. The costs associated with unbundling will already have been paid. Any OSS to provide the element will already have been developed. And any argument that

unbundling of the element will deter BOC investment will also be less substantial once the element has already been deployed and unbundled.

In any case, none of these factors can be evaluated in the abstract with respect to elements the Commission *might* exclude from the unbundling requirements of section 251 under a standard that is as yet unknown. In remanding the section 251 unbundling standard to the Commission, the D.C. Circuit emphasized the importance of market-by-market and element-by-element analysis. *United States Telecom Association v. Federal Communications Commission*, 290 F.3d 415 (D.C. Cir. 2002). Such disaggregated analysis is equally important to the section 10 forbearance inquiry as applied to section 271 checklist items. But such disaggregated analysis is not yet possible. Until it is, there is no basis to conclude that the requirements for forbearance have been satisfied.

CONCLUSION

Verizon's petition for forbearance should be denied.

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September 3, 2002

Certificate of Service

I, Lonzena Rogers, do hereby certify, that on this third day of September, 2002, I have electronically served a true and correct copy of WorldCom, Inc.'s Comments in CC Docket No. 01-338 on the following:

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